4-24-2012

State v. Ormesher Respondent's Brief Dckt. 38699

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38699
	)	
vs.	)	
	)	
KEVIN LOUIS ORMESHER,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature Of The Case

Kevin Louis Ormesher appeals from his conviction for sexual abuse of a child under the age of sixteen years.

Statement Of The Facts And Course Of The Proceedings

In late July 2010, fifteen-year-old A.R. went to a wedding, where she met Ormesher, who was working at the wedding as a disc jockey, and gave him her phone number. (Tr., p.165, Ls.12-16; p.166, L.18 – p.167, L.18.) Several days later, A.R. received a text message, and when she texted back to see who had sent it, Ormesher, using only the name "Tyler," identified himself as the disc jockey at the wedding. (Tr., p.168, Ls.17-19; p.170, L.24 – p.171, L.3.) Ormesher and A.R. agreed that A.R. would sneak out of her father's home after he went to sleep that evening and Ormesher would pick her up in his car and they would drink tequila together. (Tr., p.171, L.24 – p.172, L.25.)

At about 9:30 that evening, A.R. snuck out of her father's home and waited on a street corner in Coeur d'Alene until she saw Ormesher's sports car and got inside. (Tr., p.173, Ls.1-4; p.174, L.11 – p.175, L.12; p.179, Ls.7-12.) Ormesher gave A.R. a bottle of tequila, which she opened and began drinking straight from the bottle. (Tr., p.175, L.21- p.176, L.20.) Ormesher drove A.R. to the Nettleton Gulch trailhead and parked his car. (Tr., p.179, Ls.13-16; p.215, Ls.5-11.) While sitting in the parked car, Ormesher and A.R. drank tequila, talked, and, after about fifteen minutes, he began kissing her, which she allowed (after initially not wanting) as she became increasingly intoxicated. (Tr., p.179,

Ls.19-22; p.180, Ls.19-22.) As Ormesher kissed A.R., he touched her breasts with his hands underneath her bra. (Tr., p.181, Ls.1-16.) He also touched her legs. (Tr., p.181, Ls.1-2.) A.R.'s shirt and bra came off, with her bra ending up on the floor of the passenger side of Ormesher's car. (Tr., p.182, Ls.13-22; p.219, Ls.1-5.) A.R. was so intoxicated she started "fogging out" and blacking out. (Tr., p.182, Ls.7-12.)

Kootenai County Deputy Sheriff Shawn Lindblom was on routine patrol that evening, and when he drove to the Nettleton Gulch trailhead, he noticed Ormesher's car parked there with its headlights on. (Tr., p.215, Ls.5-11; p.216, Ls.2-6; p.217, Ls.2-7.) Deputy Lindblom observed that Ormesher was standing outside the passenger side of the car facing A.R., who was sitting in the passenger seat with the door open. (Tr., p.217, Ls.4-10.) When the deputy approached Ormesher's car, he saw A.R. attempting to pull a shirt down over her head with her breasts completely exposed. (Tr., p.219, Ls.16-25.) The deputy also noticed a bra was lying on the passenger seat floorboard. (Tr., p.219, Ls.1-5.) In trying to converse with A.R., Deputy Lindblom determined she was extremely intoxicated and incoherent, and called an ambulance to the scene to make sure she was alright. (Tr., p.220, Ls.1-13.)

Ormesher was charged with sexual abuse of a child under the age of sixteen and dispensing alcohol to a minor. (R., pp.39-40.) Prior to trial, the charge of dispensing alcohol to a minor was dismissed on the state's motion. (R., pp.50, 68-69.) After a jury trial, Ormesher was found guilty of sexual abuse of a child under the age of sixteen. (R., p.140.) The district court sentenced

Ormesher to a unified six-year term with two years fixed, and retained its jurisdiction for up to one year. (R., pp.157-159.) Ormesher filed a timely appeal. (R., pp.160-163.)

ISSUES

Ormesher states the issues on appeal as:

> 1. Did the district court err in instructing the jury because the jury instructions created an impermissible variance from the charging document?
>
> 2. Did the district court err by permitting the State to cross-examine Curtis Ormesher regarding Mr. Ormesher's prior convictions?

(Appellant's Brief, p.6.)

The state rephrases the issues as:

1. Has Ormesher failed to show a fatal variance between the charging document and the jury instructions?

2. Did the district court correctly permit the prosecutor to ask Ormesher's uncle whether knowledge about Ormesher's convictions for stalking and violation of a no-contact order would affect his opinion about Ormesher's trustworthiness?

ARGUMENT

I.
Ormesher Has Failed To Show A Fatal Variance Between The Charging Document And The Jury Instructions

A. Introduction

Ormesher contends, as he did at trial,[1] that there was a fatal variance between the Information and the jury instructions in regard to the type of sexual contact Ormesher was alleged to have committed. (Appellant's Brief, pp.7-10.) Contrary to Ormesher's argument, the difference between the language in the Information and the elements instruction does not constitute a fatal variance; therefore, Ormesher's conviction must be affirmed.

B. Standard Of Review

Whether the jury instructions fairly and adequately present the issues and state the applicable law is a question of law over which an appellate court exercises free review. State v. Bush, 131 Idaho 22, 32, 951 P.2d 1249, 1259 (1997). Whether there is a variance between a charging document and the evidence and jury instructions at trial is a question of law given free review on appeal. State v. Sherrod, 131 Idaho 56, 57, 951 P.2d 1283, 1284 (Ct. App. 1998). Likewise, whether such a variance is fatal to the conviction is given free review. Id.

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[1] See Tr., p.285, L.16 – p.286, L.18 (defense counsel objected based on an alleged variance between the "to convict" instruction and the Information); see also Tr., p.506, L.20 – p.510, L.24 (defense counsel repeated his variance argument after jury wrote a question to court during deliberations asking, "[i]s it just the breast or any sexual contact?").

C. Ormesher Has Failed To Show A Fatal Variance Because All Of The Sexual Contact At Issue In The Trial Were Part Of The Charged Crime

"A variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment." Dunn v. United States, 442 U.S. 100, 105 (1979). A variance may also occur where the jury instructions allow the jury to convict the defendant of the charged crime, but on one or more alternative theories other than what is alleged in the charging document. State v. Windsor, 110 Idaho 410, 716 P.2d 1182 (1985); State v. Montoya, 140 Idaho 160, 166, 90 P.3d 910, 916 (Ct. App. 2004).

Not all variances are fatal because "there is a marked distinction between a 'mere variance' and a variance which is automatically fatal because it amounts to an impermissible 'constructive amendment.'" State v. Jones, 140 Idaho 41, 49, 89 P.3d 881, 889 (Ct. App. 2003) (quoting State v. Colwell, 124 Idaho 560, 565-66, 861 P.2d 1225, 1230-31 (Ct. App. 1993)). Where the charging terms of the Information or charging document have been altered, literally or in effect, a constructive amendment has occurred. State v. Johnson, 145 Idaho 970, 973, 188 P.3d 912, 915 (2008) (citing United States v. Dipentino, 242 F.3d 1090, 1094 (9th Cir.2001)). A variance requires a reversal only where "it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy." State v. Adamcik, ___ P.3d ____, 2012 WL 206006 (Idaho 2012) (quoting Windsor, 110 Idaho at 417–18, 716 P.2d at 1189–90; State v. Wolfrum, 145 Idaho 44, 47, 175 P.3d 206, 209 (Ct. App. 2007)). A defendant is deprived of fair notice only if he was misled or embarrassed in the preparation or presentation of his defense. State v. Hickman, 146 Idaho 178, 182, 191 P.3d

1098, 1103 (2008). Application of these legal standards to the facts of this case shows no fatal variance. Although the jury was allowed to consider facts not specifically pled, those facts (kissing and touching a thigh) related to conduct included within the scope of the charged offense. Thus, there was neither a constructive amendment to a new offense nor prejudice in preparation of the defense.

The Information charged that on July 27, ,2010, Ormesher committed sexual abuse of a child under the age of sixteen for having "sexual contact with A.R., a child under the age of sixteen, to wit: 15 years old, by touching the breast of said child with the intent to gratify the sexual desire of the Defendant." (R., pp.39-40.) In the elements instruction, Instruction No. 12, the court instructed the jury, in relevant part, that in order to find Ormesher guilty of sexual abuse of a child under sixteen, the state must prove:

> 3. the defendant, KEVIN LOUIS ORMESHER, had sexual contact with A.R. not amounting to lewd conduct;

(R., p.126 (Instruction No.12).) The jury was further instructed that "'[s]exual contact' means any physical contact between the child and any person which is caused by the actor, or the actor causing the child to have self contact." (R., p.129 (Instruction No. 14a).) During its deliberations, the jury submitted the following question to the court, which the court read into the record as follows:

> Request judge needs to clarify charges, period. Question Number 3, Page 12, does not say anything about touching the breast. Is it just the breast or any sexual contact?

(Tr., p.506, Ls.21-24; see R., pp.109-110.)

Ormesher contends there was a fatal variance because the jury instruction on the elements of the crime "permitted the jury to find Mr. Ormesher guilty based on any act of sexual contact" (Appellant's Brief, p.7), and because A.R. testified that he kissed her, "he could have, therefore, been found guilty simply by touching or kissing A.R. even if the jury did not believe that he touched her breasts" (id., pp.9-10).

Assuming, *arguendo*, that the discrepancy between the language used in the Information and the elements instruction constitutes a variance,[2] Ormesher has failed to carry his burden of establishing a variance of constitutional significance that requires reversal. As noted, a variance is fatal if it amounts to a constructive amendment or if "'it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy,"' Adamcik, 2012 WL 206006 at *30 (quoting Windsor, 110 Idaho at 417–18, 716 P.2d at 1189–90). Review shows neither of these circumstances in this case.

Ormesher does not argue that the alleged variance rose to the level of a constructive amendment, nor can he. Ormesher was charged with, and convicted of, the single crime of sexual abuse of a child under sixteen. Moreover, Ormesher could not be tried for separate counts of sexual abuse of a child under sixteen for kissing A.R., or for touching her leg (etc.) because those (presumably) sexual contacts occurred as part of a single course of conduct in

[2] In resolving a variance claim, the court must first decide whether a variance exists. State v. Alvarez, 138 Idaho 747, 750, 69 P.3d 167, 170 (Ct. App. 2003). Inasmuch as the jury's question reflects at least some confusion between the differing language used in the Information and the elements instruction, the state will assume for the sake of argument that a variance occurred in this case.

Ormesher's car during which Ormesher also touched A.R.'s breast. In Jones, 140 Idaho at 48, 89 P.3d at 888, the Idaho Court of Appeals explained:

> Idaho Code § 19–1432 allows for the charging of two or more offenses in the same indictment or information if the offenses charged "are of the same or similar character or are based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan." *However, multiplicity may occur if a defendant is charged with a single offense in more than one count of the information or the indictment. Sanchez v. State*, 127 Idaho 709, 713–14, 905 P.2d 642, 646–47 (Ct. App. 1995). The danger of multiplicitous charging is that a defendant could be subjected to multiple punishments for a single offense. *State v. Aguilar*, 135 Idaho 894, 897, 26 P.3d 1231, 1234 (Ct. App. 2001).
>
> Whether a circumstance encompasses a single offense or multiple offenses depends upon whether there were separate and distinct prohibited acts. *Miller v. State*, 135 Idaho 261, 267, 16 P.3d 937, 943 (Ct. App. 2000); *Sanchez*, 127 Idaho at 713–14, 905 P.2d at 646–47. This determination requires an inquiry into the "circumstances of the conduct, and consideration of the 'intent and objective of the actor.'" *State v. Major*, 111 Idaho 410, 414, 725 P.2d 115, 119 (1986) (quoting *In re Ward*, 64 Cal.2d 672, 51 Cal.Rptr. 272, 414 P.2d 400 (1966)). *Thus, although a series of sexual contacts which occur as part of a single incident constitute only one count of lewd conduct under I.C. § 18–1508, a number of sexual acts occurring on separate occasions constitute multiple offenses. Miller,* 135 Idaho at 266–67, 16 P.3d at 942–43.

(Emphasis added) (holding two counts of lewd and lascivious conduct based on acts done during different trips to Jones' trailer were not multiplicitous). Under Jones' rendition of the law on multiplicity, Ormesher could not have been, and cannot be, charged with another count of the same crime (i.e., sexual abuse of a child under sixteen) based on slightly different conduct (i.e., kissing A.R. or touching her leg (etc.)) occurring during the same incident involved in his current case.

If Ormesher had been charged in a separate count with sexual abuse of a child under sixteen based upon his kissing A.R. or touching her leg on the night they parked in his car, he would no doubt have objected that the charge was multiplicitous. See id. Ormesher would certainly be unwilling to admit that the state could now charge him with or punish him for another count of sexual abuse of a child under sixteen, but would instead claim that such a charge or punishment is barred under double jeopardy by his current conviction. Because Ormesher cannot be charged with the same crime occurring during the same incident, he is at no risk of being placed in double jeopardy.[3]

As a result, there was no constructive amendment or fatal variance. Indeed, the jury was not required to determine the exact method by which Ormesher had sexual contact with A.R. as they sat in his parked car. See Schad v. Arizona, 501 U.S. 624 (1991) (plurality with fifth Justice concurring in the result) (jury need not agree on exact means of commission of crime of murder); State v. Severson, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009) ("The jury could have found Severson guilty of murdering his wife by overdosing her,

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[3] Ormesher claims that he is at risk of being placed in double jeopardy, stating:

> By not requiring the jury to make a conclusion on the manner in which Mr. Ormesher committed the crime, the court left Mr. Ormesher open to the risk of double jeopardy because it is not clear what specific act Mr. Ormesher was convicted of. The variance in this case was, therefore, fatal.

(Appellant's Brief, p.10.) Ormesher does not explain how he could be "open to the risk of double jeopardy" for any of his actions during the time he was parked in his car with A.R. Because Ormesher was charged with sexual abuse of a child under sixteen and convicted of that same crime, there was no constructive amendment of the charge, and because all of the sexual contact at issue during the trial was part of the charged crime, there was no fatal variance.

suffocating her, or both."); State v. Tucker, 131 Idaho, 174, 178, 953 P.2d 614, 618 (1998) (Schroeder, J., concurring) (belief that controlled substance possessed was different than that charged is not defense); Downing v. State, 136 Idaho 367, 373, 33 P.3d 841, 847 (Ct. App. 2001) (jury not required to agree on exact act constituting offense). Because Ormesher was charged with sexual abuse of a child under sixteen, it is ultimately irrelevant whether he was found to have kissed her, touched her leg, or touched her breasts, during the same incident. Regardless of the method Ormesher used to commit the crime of sexual abuse of a child under sixteen, there is no chance he was convicted of a crime for which he was not charged.

As noted above, the jury was not required to find whether Ormesher touched A.R.'s breast before it could convict him of sexual abuse of a child under sixteen. Likewise, because the crime ultimately charged and submitted to the jury was sexual abuse of a child under sixteen, an amendment of the Information from "touching the breast" to "kissing" or "touching the leg" as the means whereby sexual contact occurred is not the sort of amendment that could result in Ormesher having been convicted of a crime other than that charged. Ormesher's claim thus fails to establish a constructive amendment as a matter of law.

Ormesher has also failed to show that the variance deprived him of fair notice. Adamcik, 2012 WL 206006 at *30; Windsor, 110 Idaho at 417–18, 716 P.2d at 1189–90. A defendant is deprived of fair notice only if he was misled or embarrassed in the preparation or presentation of his defense, Hickman, 146

Idaho at 182, 191 P.3d at 1103. Ormesher has failed to meet this burden. In regard to "fair notice," Ormesher argues:

> The charging document put Mr. Ormesher on notice that he had to defend against an allegation that he touched A.R.'s breasts. However, due to the jury instruction, *he had to defend against an allegation that he touched A.R. at all with the intent to gratify his sexual desire.* He could have, therefore, been found guilty simply by touching or kissing A.R. even if the jury did not believe that he touched her breasts.

(Appellant's Brief, pp.9-10 (emphasis added).) Although Ormesher asserts he was not given fair notice he might have to defend against an allegation that he kissed or touched A.R. with the intent to gratify his sexual desire, he does not explain how he was "misled or embarrassed in the preparation or presentation of his defense." Hickman, 146 Idaho at 182, 191 P.3d at 1103. At trial, Ormesher testified that he never kissed A.R. during the incident. (Tr., p.261, Ls.12-19.) Apart from his generalized complaint that he had to defend against having sexual contact with A.R. other than by touching her breast, Ormesher fails to divulge just how he was misled or embarrassed in the preparation or presentation of his defense. By testifying that he did not kiss A.R. during the incident, Ormesher did all that could possibly be done to contest the point. Ormesher has failed to show how any lack of notice he might have had misled or embarrassed him in preparing for or presenting his defense. There is no indication in the record that, had Ormesher been provided the notice he claims the instructions deprived him of, he would have testified or conducted his cross-examination of the state's witnesses any differently, or that he would have presented a different theory of his case at trial.

Ormesher has failed to demonstrate that failure to specifically limit the jury's consideration to only touching of the breasts created a fatal variance. He has not shown how there was a constructive amendment or that he has been deprived of his right to fair notice, or that the alleged variance leaves him open to the risk of double jeopardy. See Adamcik, 2012 WL 206006 at *30; Hickman, 146 Idaho at 182, 191 P.3d at 1103.

II.

The District Court Correctly Permitted The Prosecutor To Ask Ormesher's Uncle Whether Knowledge About Ormesher's Convictions For Stalking And Violation Of A No-Contact Order Would Affect His Opinion About Ormesher's Trustworthiness

A. Introduction

During the defense case-in-chief, Curtis Ormesher, Ormesher's uncle, was asked on direct examination whether Ormesher is a moral person, and responded that he is a moral person and is trustworthy. (Tr., p.359, L.25 – p.360, L.8.) Over Ormesher's objection, the district court permitted the prosecutor to ask Curtis Ormesher on cross-examination whether his opinion of his nephew's trustworthiness would change if he knew Ormesher had convictions for first degree stalking in 2007 and violation of a no contact order in 2009. (Tr., p.363, L.17 – p.364, L.20; p.367, Ls.6-17.) On appeal, Ormesher argues "that the district court erred in concluding that his convictions for stalking and violating a no-contact order were relevant to his *truthfulness*. The district court therefore erred by permitting the State to cross-examine Curtis Ormesher with these convictions." (Appellant's Brief, p.11 (emphasis added).)

Despite framing the evidentiary issue decided by the district court as centering on Ormesher's truthfulness, the record reveals that the court's ruling and the testimony upon which it was based concerned Ormesher's morality and trustworthiness. Because Ormesher has failed to discuss, much less refute, the district court's basis for allowing the prosecution to rebut Curtis Ormesher's opinion testimony that Ormesher is trustworthy, he has failed to show error. See, e.g., State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (trial court will be affirmed when basis for decision unchallenged on appeal). Even if the district court's evidentiary ruling is considered, Ormesher has failed to show that the district court abused its discretion.

B. Standard Of Review

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been a clear abuse of discretion. State v. Perry, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010) (citations omitted).

C. Because Ormesher's Uncle Testified That, In His Opinion, Ormesher Is Trustworthy, The District Court Properly Permitted The Prosecutor To Cross-Examine Him About Specific Incidents Of Crime Relevant To That Opinion

In Ormesher's case-in-chief, his uncle, Curtis Ormesher, was asked by Ormesher's trial attorney if he had an opinion "as to whether [Ormesher] is a moral person?" (Tr., p.359, L.25 – p.360, L.1.) Ormesher's uncle responded:

> *Absolutely.* I *trust* him – I'm semi-reclusive, and he's one of the only people I would *trust* in my home when I take vacations. I *trust* him to watch my cats. I *trust* him with everything. We go on jobs for some pretty high-end clientele. Uh, I *trust* him in their

> offices, in their homes, and they *trust* him, also. He doesn't pry into things. He's just *trustworthy*.

(Tr., p.360, Ls.2-8 (emphasis added).) Curtis Ormesher's confirmation that Ormesher is "absolutely" a moral person and seven references to trust (or trustworthy) leaves no room to doubt that his opinion was about Ormesher's morality and trustworthiness – not truthfulness.

During cross-examination of Curtis Ormesher, the prosecutor advised the trial judge, outside the presence of the jury, that he intended to ask Ormesher's uncle whether his opinion that Ormesher is moral and trustworthy "would . . . change knowing he has been convicted of first degree stalking . . . in 2007," and of a "no contact order violation in 2009." (Tr., p.363, L.17 – p.364, L.20.) Ormesher's trial counsel objected to the questions on the grounds that the fact of the prior convictions were not relevant to credibility and were "more prejudicial than probative of any point at issue," and requested that, if the questions were admitted, the first degree stalking offense be referred to as a misdemeanor. (Tr., p.365, Ls.21-25; p.366, L.22 – p.367, L.5.)

The trial court ruled the proffered questions were admissible, initially phrasing the issue in terms of Ormesher's "honesty," but quickly clarifying that the relevant testimony only concerned Ormesher's "trustworthiness." The court explained:

> Well, I think both of these offenses are probative as to the issue of honesty of the defendant and this witness's, Mr. Curtis Ormesher's, knowledge regarding his opinion that he's already stated as to the trustworthiness and honesty of the defendant. *Really the testimony is all about trust, and so I think both of these offenses really go directly to trust, so for purposes of impeachment I think they're highly probative, highly relevant.*

> I'm gonna allow the inquiry. We may be in a situation where the State's stuck with the witness's answer. We might not be able to use extrinsic evidence. . . .

(Tr., p.367, Ls.6-17 (emphasis added).) After several comments by the attorneys, the court concluded:

> *I think if the questions would've been posed of this witness in terms of honesty, which is ordinarily what's allowed under the rule rather than trustworthiness, I think we'd have a whole different issue here*, but my notes show nothing but trusted in my home, trusted in client's home, I trust him, he's trustworthy. I think that's what we're left with. All right. That's my ruling.

(Tr., p.368, L.24 – p.369, L.6 (emphasis added).)

Despite Curtis Ormesher's testimony about Ormesher's trustworthiness and the district court's corresponding ruling, in the introduction to this issue in his brief on appeal, Ormesher asserts "the district court erred in concluding that his convictions for stalking and violating a no-contact order were relevant to his *truthfulness.*" (Appellant's Brief, p.11 (emphasis added).) In subsequently reiterating in his brief what Curtis Ormesher testified about, and quoting what the district court found, Ormesher temporarily used the correct terminology – "trustworthy" and "trustworthiness." (Id., pp.11-12.) However, from that point on in his brief, Ormesher abandons all reference to "trust," and reverts back to claiming that "[s]talking and violating a no-contact order are not relevant to a witness's truthfulness." (Id., p.13.) Ormesher ends his appellate brief repeating his contention that "the district court erred by concluding that the prior convictions were relevant to Mr. Ormesher's truthfulness." (Id., p.14.) Having given a new label (i.e., truthfulness) to the nature of Curtis Ormesher's testimony and the

district court's ruling, Ormesher analogizes to I.R.E. 609, and argues that questions to his uncle about Ormesher's two convictions were inadmissible because they do not reflect acts of deceit or dishonesty. (Id., pp.12-14.)

Contrary to Ormesher's argument, neither his uncle's testimony nor the district court's actual ruling concerned Ormesher's character for truthfulness. Rather, Curtis Ormesher gave opinion testimony about Ormesher's morality and trustworthiness. Because the court made its evidentiary ruling on the basis of Curtis Ormesher's testimony about Ormesher's "trustworthiness," Ormesher has failed to challenge the actual ruling of the court, which should be affirmed on the basis of its actual ruling. See Goodwin, 131 Idaho at 366, 956 P.2d at 1313. Even if Ormesher had properly challenged the court's actual ruling, he would be unable to show error.

Under Idaho Rule of Evidence 405(a), when Ormesher's uncle testified that Ormesher was trustworthy, he opened the door for the prosecutor to ask him relevant questions tending to rebut that characteristic. Rule 405(a) states:

> (a) **Reputation or opinion**. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct.*

(Emphasis added.)

In a case involving a similar situation to Ormesher's case, State v. Harvey, 142 Idaho 527, 129 P.3d 1276 (Ct. App. 2006), Harvey was charged with sexual abuse of a minor under sixteen and indecent exposure. During trial, character witnesses testified about Harvey's "good character when dealing with or being

around children," and the prosecutor rebutted that testimony by cross-examining the witnesses about evidence that Harvey had committed three crimes in the past – battery, domestic violence, and disturbing the peace. Id. at 532-33, 129 P.3d at 1281-82. The Idaho Court of Appeals explained and held:

> Character evidence ordinarily is inadmissible for the purpose of showing that an individual acted in conformity therewith on any particular occasion. I.R.E. 404(a); *State v. Rupp*, 118 Idaho 17, 19, 794 P.2d 287, 289 (Ct. App.1990). A criminal defendant may, however, offer evidence of a pertinent character trait, provided the prosecution is afforded an opportunity to rebut the same. I.R.E. 404(a)(1); *Rupp*, 118 Idaho at 19, 794 P.2d at 289. Idaho Rule of Evidence 404 requires the defense to "open the door" regarding evidence of good character of the accused before the state can counter with any evidence regarding the defendant's bad character. *Rupp*, 118 Idaho at 19, 794 P.2d at 289. Character evidence may usually be admitted only as testimony in the form of an opinion or testimony as to reputation. I.R.E. 405(a). On cross-examination, though, a party may inquire about relevant specific instances of conduct. *Id.*
>
> In this case, opinion evidence regarding Harvey's good character around children could be rebutted by evidence that Harvey had been previously found guilty of battery and domestic battery crimes not involving children. It would be reasonable for a person to be hesitant to allow children to be cared for or influenced by an individual with a history of violent crimes of any type. Just as Harvey offered opinion evidence of his good character around children, the district court properly allowed the state to introduce evidence that would make a reasonable person doubt his or her opinion of the good character attested to. Therefore, we conclude the ruling of the district court, regarding the admissibility of Harvey's battery and domestic battery crimes, is soundly reasoned and well within the boundaries of its discretion. Accordingly, the district court did not abuse its discretion in allowing the state to admit evidence of the specific crimes of battery and domestic battery to challenge the opinion evidence of Harvey's good character around children.[4]

[4] The Harvey court also determined that Harvey's disorderly conduct conviction was improperly permitted to rebut the testimony of Harvey's character witnesses because such a crime includes a broad range of conduct and is not the sort of

Harvey, 142 Idaho at 533, 129 P.3d at 1282.

The Harvey decision concluded that "[i]t would be reasonable for a person to be hesitant to allow children to be cared for or influenced by an individual with a history of violent crimes of any type." Id. Similarly, in Ormesher's case, it would be reasonable for a person to doubt Ormesher's morality and "trustworthiness" knowing he had been convicted of stalking and violation of a no-contact order. Even though stalking and violation of a no-contact order may not be crimes of deceit or dishonesty, they are, as the district court found, relevant to the question of trustworthiness. When the prosecutor said, "on the face of it a stalking conviction certainly carries a strong inference of lack of trustworthiness[,]" and explained that obtaining a copy of the Nevada stalking statute as suggested by Ormesher's trial counsel was not warranted, the district court responded, "Well, and I agree." (Tr., p.368, Ls.19-24.) The offense of violation of a no-contact order also denotes a lack of trustworthiness by showing a person could not even be trusted to comply with an order by a court.

In sum, the district court correctly concluded that the two crimes were relevant to the question of whether Ormesher was trustworthy. Therefore, Ormesher has failed to demonstrate that the district court abused its discretion in permitting the prosecutor to ask Curtis Ormesher whether knowing about such crimes would affect his opinion about Ormesher's trustworthiness.

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crime reasonable people would conclude negatively impacts a person's fitness to be around children. Harvey, 142 Idaho at 533, 129 P.3d at 1282.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment of conviction.

DATED this 24th day of April, 2012.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of April, 2012 served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDERS

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm